application was denied without published opinion on June 20, 2000. *People v. Cain*, 735 N.E.2d 419 (N.Y. 2000). Cain did not seek a writ of certiorari from this Court.

State Collateral Challenges

On August 24, 2000, Cain filed a *pro se* motion, pursuant to section 440.10 of the New York Criminal Procedure Law, seeking to vacate his judgment of conviction, arguing that the evidence that led to his conviction consisted of the fruits of the confession illegally obtained from Rosario. C.A. 24-26. On October 30, 2000, the Supreme Court of New York, Queens County, denied the motion. *Id.* at 52. On November 28, 2000, Cain sought permission to appeal the denial. *Id.* The Second Department denied Cain's request on February 5, 2001. *Id.* at 53.

On Friday, December 7, 2001, Cain completed an application to the Second Department for a writ of error *coram nobis*, alleging ineffective assistance of counsel on his direct appeal. *See* C.A. 25, 96. Cain argued that his appellate counsel, among other omissions, failed to argue that Rosario's statement to the police implicating Cain was coerced. *Id.* at 53. Cain submitted the *coram nobis* application to prison officials for mailing on Monday, December 10, 2001.

The Second Department, however, did not stamp Cain's *coram nobis* application as "received" until December 17, 2001, seven days after it was submitted to prison authorities. *See* C.A. 98. The record contains no explanation for this delay. On April 29, 2002, the Second Department denied Cain's *coram nobis* application. *People v. Cain*, 708 N.Y.S.2d 413 (N.Y. App. Div. 2002).

The Federal Petition for a Writ of Habeas Corpus

Less than two months later, on June 26, 2002, Cain submitted to prison authorities for mailing his federal habeas petition, alleging violations of the Fourth, Sixth, and Fourteenth Amendments to the U.S. Constitution. C.A. 6-31, 46. Specifically, the petition alleged that the lineup was unduly suggestive, that Cain's appellate counsel was unconstitutionally ineffective, and that his conviction was the result of an unlawfully obtained confession. *Id.* at 6-31. The petition was not marked as received by the clerk of the Eastern District of New York until July 3, 2002. *Id.* at 6.

The Superintendent of Attica Correctional Facility, who is the petitioner before this Court, argued to the district court that Cain's habeas petition should be dismissed as time-barred under the one-year statute of limitations of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The Superintendent argued that the "prison mailbox rule," under which the papers of *pro se* prisoners are considered filed at the moment of their delivery to prison officials for mailing, should not be applied to Cain's postconviction filings. The district court agreed, ruling that Cain's *coram nobis* application had been "filed" in the Second Department on the date it was marked as received by the court, December 17, 2001; that Cain's federal habeas petition was "filed" on July 3, 2002, the date it was marked as received by the federal court; and therefore that Cain's federal habeas was untimely. Pet. at 2a-4a.[2] (The district court did not specify how many days past AEDPA's one-year deadline the petition had

[2] Citations to "Pet." refer to the Petition for a Writ of Certiorari filed by Superintendent Herbert and its accompanying appendix.

been filed, but the court's rulings suggest that the petition would have been untimely by fourteen days.) Had the district court applied the prison mailbox rule both to Cain's state *coram nobis* application and to his federal habeas petition, however, Cain's federal habeas would have been timely by one day.

The district court explained its decision not to apply the mailbox rule to Cain's state *coram nobis* application by asserting that "[s]tate law controls the question of when a postconviction motion is considered properly filed" and that "[i]n New York, the date of filing is the date that the motion is received by the clerk of the court; it is not the date that the prisoner gives the document to corrections authorities for filing." Pet. at 2a-3a. The district court did not explain its decision not to apply the mailbox rule to the filing of Cain's federal habeas petition itself – a decision that was directly contrary to the established law in the Second Circuit. *See Noble v. Kelly*, 246 F.3d 93, 97-98 (2d Cir.), *cert. denied*, 534 U.S. 886 (2001) (extending the prison mailbox rule to the filing of federal habeas petitions).

On May 6, 2003, Cain petitioned the district court for a Certificate of Appealability ("COA"), which the court denied. Cain then moved for a COA in the Second Circuit, which was granted on November 13, 2003. The Second Circuit's order states in relevant part: "Upon due consideration, it is ORDERED that the motion is granted on the issue of whether the prison mailbox rule applies to state filings that toll the AEDPA's statute of limitations." Pet. at 6a.

On appeal, the Second Circuit decided this case in an unpublished summary order.[3] The order reiterated the

[3] *See* 2d Cir. R. 0.23 ("Since [summary orders] do not constitute formal opinions of the court and are unreported or not uniformly

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court's holding in *Noble* that the prison mailbox rule applies to the filing of federal habeas petitions and stated that Cain's federal habeas should therefore be deemed as having been filed on June 26, 2002. Pet. at 8a. The Second Circuit further ruled that, for the limited purpose of calculating AEDPA tolling time, the prison mailbox rule should also be applied to Cain's *coram nobis* application. *Id.* For this aspect of its ruling, the court referred to its published decision in *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005), *cert. pending*, Sup. Ct. Index No. 04-1540,[4] a case that was heard in tandem with Cain's and which also addressed whether a federal court in calculating AEDPA tolling time should apply the prison mailbox rule to state postconviction motions.

In *Fernandez*, the Second Circuit reasoned that application of the mailbox rule to state filings for the purpose of calculating AEDPA tolling time "is consonant with AEDPA's goals of 'furthering the principles of comity, finality, and federalism.'" 402 F.3d at 115 n.3, *quoting Williams v. Taylor*, 529 U.S. 420, 436 (2000). Applying the mailbox rule, the court stated, "grants the full statute of limitations for *pro se* prisoners attempting to reach the courts" and "evinces no disrespect for the competence of state courts, their procedures, or the stability of state verdicts." 402 F.3d at 115 n.3. The Second Circuit also noted that its result was consistent with this Court's ruling in *Artuz v. Bennett*, 531 U.S. 4 (2000), because the petitioner's *coram nobis* application was "properly filed"

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available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court").

[4] Counsel for Respondent Cain is also representing Respondent Fernandez in opposing the Superintendent of Green Haven Correctional Facility's petition for a writ of certiorari.

under state law and procedure. *Fernandez*, 402 F.3d at 114, 116. Because New York has no deadline for the filing of *coram nobis* applications, the issue of timeliness does not arise during the state's consideration of such an application. *Id.* at 116. Thus, noted the Second Circuit, there "is no and can be no real conflict between state law and federal law" in applying the mailbox rule to a New York *coram nobis* application when a federal court calculates AEDPA tolling time. *Id.*

REASONS FOR DENYING THE WRIT

I. The Second Circuit Properly Exercised Jurisdiction Over Respondent's Habeas Appeal, Consistent With This Court's Decisions In *Slack v. McDaniel* And *Miller-El v. Cockrell*, As Well As With The Holdings And Practices Of Other Circuits.

A certificate of appealability ["COA"] may issue under 28 U.S.C. § 2253(c)(2) only "if the applicant has made a substantial showing of the denial of a constitutional right." The statutory language places the onus on the applicant to make this showing, but an appellate court, when deciding whether to grant a COA, may make only a "threshold inquiry" into whether the necessary showing has been made. *Slack v. McDaniel*, 529 U.S. 473, 482, 485 (2000). The inquiry "requires an overview of the claims in the habeas petition and a general assessment of their merits," but "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court denies a habeas petition on procedural grounds without reaching the petition's

underlying constitutional claims, as happened in this case, a COA applicant must show that reasonable jurists would find it debatable both "whether the district court was correct in its procedural ruling" and "whether the petition states a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484.

The Superintendent does not argue that Respondent Cain failed to meet the procedural component of this test, *see* Pet. at 12-17, as the district court's decision not to apply the mailbox rule to Cain's state *coram nobis* application when calculating the deadline for filing his federal petition was at the very least "debatable." The jurisdictional issue raised by the Superintendent is thus whether it was also debatable that Cain stated a valid claim of the denial of a constitutional right. To have done so, Cain must have shown that reasonable jurists "could conclude the [constitutional] issues presented are adequate to deserve encouragement to proceed further," by proving "something more than the absence of frivolity or the existence of mere good faith" on his part. *Miller-El*, 537 U.S. at 327, 328 (internal quotation marks omitted). Importantly, "a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337.

Cain easily satisfied this threshold inquiry. In his federal habeas petition and in his application for a COA, both of which were filed *pro se*, Cain alleged that his Fourth Amendment rights were violated in part because the direct fruits of an unlawful, coerced confession led to his conviction. *See* C.A. 26, 114-15, *citing Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (holding evidence

from such confessions to be excludable). As described above, Cain's arrest occurred only after he was identified in the confession of a codefendant, Amaury Rosario, who was acquitted of all charges after testifying about how police used force to coerce his confession. Before Rosario's "confession," the state's pivotal witness, Eric Caraballo, was unable to identify Cain as the gunman, and in front of the grand jury Caraballo testified only that the perpetrator was "black" and "tall" – adding "that's the only thing I could see." But at Cain's trial, which took place after Rosario's "confession," Caraballo testified that he did in fact see the gunman's face, which he would "never forget."

Cain also alleged that his due process rights were violated by the use of an unduly suggestive lineup. *See* C.A. 10-13. As noted above, during the initial police investigation, the gunman was described as being between 18 and 21 years old, heavy-set and between 5'10" and 6' tall. But Cain, at 25 years old, 250 pounds, and 6'2" tall, was the only lineup participant even close to matching that description; the other five were all at least 30 years old and, as the arresting officer acknowledged, none of them matched Cain's weight or height. In addition, the police department photograph of the lineup rendered any judicial review of the lineup difficult, because it clearly depicted only Cain and two other participants. (The other three were "indescribable or unobservable.") *Id.* at 10-11.

There can be no doubt that these claims of constitutional violations – as well as Cain's additional allegation of ineffective assistance of appellate counsel, in that the appointed counsel on his appeal did not raise the issue of the coerced confession – present non-frivolous issues that reasonable jurists could conclude are "adequate to deserve encouragement to proceed further." The Second Circuit therefore acted

properly in granting Cain a COA, which it did "[u]pon due consideration" following the district court's denial of Cain's habeas petition on timeliness grounds. *See* Pet. at 6a.

The Superintendent, however, distorts this Court's holding in *Slack* to argue that a COA cannot issue unless the district court or court of appeals makes a "finding" about the "merits" of a petitioner's constitutional claim. Pet. at 9, 11, 13, 16. But a COA determination is *not* a "merits determination." *Cf.* Pet. at 16. Rather, it is "a separate proceeding, one distinct from the underlying merits." *Miller-El*, 537 U.S. at 342. In fact, this Court has explicitly cautioned that an appellate court may *not* "first decid[e] the merits of an appeal, and then justify[] its denial of a COA based on its adjudication of the actual merits," because doing so would be "in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37. Contrary to the argument of the Superintendent, therefore, the Second Circuit was in no way required to make a special finding about the merits of Cain's constitutional claims; it was enough that Cain had made a clear showing in his habeas petition and in his COA that reasonable jurists could debate whether his constitutional rights were violated. To accept the Superintendent's argument would be to turn *Slack* and *Miller-El* upside down.[5]

The Superintendent is also plainly wrong to suggest that the Second Circuit "routinely" exercises jurisdiction over cases in which no substantial showing of the denial of a constitutional right has been made. *Cf.* Pet. at 16. On

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[5] If the Second Circuit is to be faulted in any way, it is that the court did not indicate in its November 10, 2003 order on which issues Cain had made a substantial showing, *see* Pet. at 6a, but such a minor omission surely does not merit Supreme Court review.

the contrary, in case after case, the Second Circuit has exercised great care to ensure that it does not grant COAs to applicants who fail *Slack*'s two-prong test. *See, e.g.*, *Morales v. Greiner*, 381 F.3d 47, 48 (2d Cir. 2004) (denying *pro se* COA motion for failure to make substantial showing); *United States v. Doe*, 365 F.3d 150, 154 (2d Cir.), *cert. denied*, 125 S.Ct. 449 (2004) (conditioning potential COA upon applicant making "substantial showing of the denial of [his] constitutional right [to counsel]"); *Jones v. Keane*, 329 F.3d 290, 297 (2d Cir.), *cert. denied*, 540 U.S. 1046 (2003) (liberally construing prisoner's appellate brief as COA motion, but denying COA for failure to make substantial showing); *Rudenko v. Costello*, 322 F.3d 168, 170 (2d Cir. 2003) (vacating consolidated COA granted to 16 unrelated petitioners because "each application will require particularized consideration" of "whether the applicant has sufficiently made 'a substantial showing of the denial of a constitutional right'"); *Eltayib v. United States*, 294 F.3d 397, 400 (2d Cir. 2002) (denying *pro se* COA motion for failure to show reasonable jurists would debate constitutional claims); *United States v. Outen*, 286 F.3d 622, 634, 641 (2d Cir. 2002) (liberally construing letter to court as COA request, but denying motion due to failure of merits brief to make substantial showing); *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (denying *pro se* COA motion for failure to satisfy *Slack*'s procedural component).

Given this considerable body of case law, it is telling that the Superintendent cites only two published cases for the sweeping proposition that it is "common practice" for courts in the Second Circuit to violate the *Slack* requirements.[6] *Cf.*

[6] The Superintendent also cites two unpublished cases in which district courts in the Second Circuit issued COAs on timeliness issues

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Pet. at 13-14, *citing Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) and *Harrison v. Artuz*, 105 F. Supp. 2d 101 (E.D.N.Y. 2000), *aff'd sub nom. Clark v. Barkley*, No. 00-2695, 51 Fed. Appx. 332 (2d Cir. Oct. 22, 2002) (unreported). Yet neither of these cases actually supports the Superintendent's conclusion. In *Baldayaque*, the district court granted a COA on a timeliness issue only after stating that the petitioner had "a constitutional claim of arguable merit" – thereby satisfying the *Slack* requirements. *See United States v. Baldayaque*, Nos. 3:95CR81, 3:99CV2272, 2002 WL 31094962 at *6 (D.Conn. Sept. 6, 2002) (unreported). And on appeal, the government explicitly asserted that the Second Circuit did indeed have appellate jurisdiction pursuant to the district court's issuance of a COA. *See* Brief for the United States of America at viii, *Baldayaque* (No. 02-2611), *available at*

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without also specifying on what constitutional issues the petitioners had made the requisite threshold showings. *See* Pet. 13-14, *citing Brigian v. Artuz*, No. 01-2389, 37 Fed. Appx. 559 (2d Cir. Jun. 18, 2002); *Bond v. Walsh*, No. 01-CV-0776, 2002 WL 460046 (E.D.N.Y. Feb. 12, 2002). But because *Bond* and *Brigian* were resolved by unreported summary orders, it is possible that the petitioners in both cases did in fact make the requisite constitutional showing even though the courts' orders mentioned only the procedural issues in need of legal clarification. In *Bond*, for example, the district court was careful to mention all seven of the petitioner's underlying constitutional claims, suggesting the petitioner may have met *Slack*'s threshold inquiry. *See Bond*, 2002 WL 460046 at *1.

Such an inference in both cases is supported by the fact that in *neither* case did the state government respondent challenge the Second Circuit's appellate jurisdiction. *See* Brief for Respondent-Appellee, *Bond*, 53 Fed. Appx. 162 (2d Cir. Sept. 27, 2002) (No. 02-2157), *available at* 2002 WL 32391985; Brief for Respondent-Appellee, *Brigian* (No. 01-2389) (on file with Respondent). Noteably, the state superintendent in this case *does* make such a challenge, despite being represented by the District Attorney for Queens County, New York, who also represented the state officials in both *Bond* and *Brigian*.

2003 WL 23336105. Likewise, in *Harrison*, even though the district court had issued COAs to both petitioners on a timeliness issue without specifying whether they had met *Slack*'s constitutional requirement, the government did not contest the Second Circuit's jurisdiction on appeal. *See* Appellee's Brief and Appendix, *Harrison v. Artuz*, 12 Fed. Appx. 56 (2d Cir. June 15, 2001) (No. 00-2445), *available at* 2000 WL 33981691; Appellee's Brief and Appendix, *Clark v. Barkley*, 51 Fed. Appx. 332 (2d Cir. Oct. 22, 2002) (No. 00-2695), *available on* Westlaw (no WL number).

Notably, the Superintendent does not cite a single case other than Cain's – either published or unpublished – in which the Second Circuit supposedly granted a COA to an applicant who failed to make the requisite constitutional showing. In the one case that Respondent Cain could find in which this occurred, *Catlett v. Greiner*, No. 02-2121, 76 Fed. Appx. 345, 347 (2d Cir. Jul. 2, 2003) (unreported), the Second Circuit realized its error and immediately vacated its own COA, ruling that even though the case presented an important procedural issue, the petitioner had failed to make a substantial showing of the denial of a constitutional right. A fair look at the case law, therefore, reveals that the Second Circuit carefully follows the dictates of *Slack*, *Miller-El*, and 28 U.S.C. § 2253(c)(2), just as the court did in this case.

Moreover, the other courts of appeals also carefully adhere to these requirements, despite the Superintendent's attempt to manufacture a circuit split where none exists. *Cf.* Pet. at 14-15. To support his claim that several circuits outside the Second "appear to exercise jurisdiction frequently in the absence of the requisite showing," the Superintendent selectively cites five cases from around the country, three of which are unpublished dispositions and

none of which sustains his conclusion. *See Day v. Crosby*, 391 F.3d 1192 (11th Cir. 2004); *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003); *Walker v. Warden*, No. 04-30607, 125 Fed. Appx. 568 (5th Cir. Apr. 5, 2005) (per curiam) (unreported); *Franklin v. Dretke*, No. 04-40444, 106 Fed. Appx. 926 (5th Cir. Aug. 25, 2004) (per curiam) (unreported); *Wampler v. Mills*, No. 02-5447, 60 Fed. Appx. 594 (6th Cir. Apr. 2, 2003) (unreported). In both *Day v. Crosby* and *Walker v. Crosby*, the two published Eleventh Circuit decisions cited by the Superintendent, both the federal and state government respondents explicitly asserted that the court had jurisdiction to hear the appeals. *See* Answer Brief of Appellee at 1, *Day v. Crosby* (No. 04-10778) (asserting the court's jurisdiction over the issue "as framed in the certificate of appealability") (on file with Respondent); Answer Brief of Appellee at 1, *Walker v. Crosby* (No. 01-12491) ("This court has jurisdiction pursuant to 28 U.S.C. section 2253") (on file with Respondent).

In *Franklin v. Dretke*, *Walker v. Warden*, and *Wampler v. Mills*, the cursory nature of the unpublished dispositions makes it difficult to determine precisely what conclusions the courts drew or what kind of showing the petitioners made,[7] but all three cases suggest that the courts attempted to adhere to *Slack's* mandates. In *Walker v. Warden*, the Fifth Circuit held that it could not rule out that reasonable jurists might debate "whether the claims raised . . . are valid claims of a constitutional deprivation." 125 Fed. Appx. at 568. In *Franklin*, the court granted a COA, vacated the district court's decision for procedural

[7] *See* 5th Cir. R. 47.5.4 ("Unpublished opinions . . . are not precedent"); 6th Cir. R. 28(g) ("Citation of unpublished decisions in briefs . . . is disfavored").

error, and then remanded the case "for consideration of the constitutional claims set forth in [the prisoner's] habeas petition." 106 Fed. Appx. at 926. In *Wampler*, the Sixth Circuit issued a COA to an applicant whose habeas petition raised four significant underlying constitutional claims, all of which may have satisfied the requisite substantial showing; the district court had not analyzed those claims only because the state immediately sought summary judgment on claim preclusion grounds. 60 Fed. Appx. at 595.

This handful of cases simply does not support the Superintendent's proposition that "the Second Circuit and other circuit courts routinely exercise jurisdiction" over habeas appeals while ignoring the requirements of 28 U.S.C. § 2253(c)(2). *See* Pet. at 16. Rather, a vast body of published case law – conveniently left out of the Superintendent's analysis – in each of the allegedly delinquent circuits demonstrates the universal recognition that *Slack* and *Miller-El* are the law of the land. *See, e.g.*, *Centobie v. Campbell*, 407 F.3d 1149, 1151 (11th Cir. 2005) (per curiam) (denying COA for applicant's failure to make substantial showing); *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000) (holding court could not "grant a COA on a procedural issue" if reasonable jurists "would not find it debatable both whether 'the petition states a valid claim of the denial of a constitutional right' and whether 'the district court was correct in its procedural ruling' "); *Hughes v. Dretke*, 412 F.3d 582, 590 (5th Cir. 2005) (denying COA because applicant did not show "reasonable jurists could disagree with the district court's denial of any of his claims, nor could jurists conclude that any of [his] claims deserve encouragement to proceed further"); *Cardenas v. Dretke*, 405 F.3d 244, 254 (5th Cir. 2005) (denying COA for applicant's failure to show "reasonable jurists could disagree with the district court's denial" of any

of his claims); *Houser v. Dretke*, 395 F.3d 560, 561 (5th Cir. 2004) (holding that applicant did not prove "reasonable jurists could find it debatable that the petition states a valid claim of the denial of a constitutional right"); *Cyars v. Hofbauer*, 383 F.3d 485, 492 (6th Cir. 2004) (denying COA because "reasonable jurists could not find the district court's assessment of [applicant's due process] claim debatable or wrong"); *Frazier v. Huffman* 343 F.3d 780, 788-89 (6th Cir. 2003) (holding that district court erred in issuing blanket COA without analysis because COA may issue "*only* if the applicant has made a substantial showing of the denial of a constitutional right" as "[t]he language of § 2253(c) is mandatory" (internal quotation marks omitted)).[8]

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[8] In fact, all the circuits strictly adhere to *Slack*'s mandates. *See, e.g., United States v. Lambros*, 404 F.3d 1034, 1037 (8th Cir.), *cert. denied*, 125 S.Ct. 2953 (2005) (denying COA for failure to make "a substantial showing of any error, much less constitutional error"); *Dalton v. Battaglia*, 402 F.3d 729, 738 (7th Cir. 2005) (declining to expand district court's COA to include additional claims because applicant failed to show "reasonable jurists could debate whether . . . the issues presented were adequate to deserve encouragement to proceed further"); *United States v. Vargas*, 393 F.3d 172, 174 (D.C. Cir. 2004), *reh'g denied*, 415 F.3d 23 (D.C. Cir. 2005) (denying COA because applicant could not make substantial showing since claim raised no constitutional question); *Allen v. Lee*, 366 F.3d 319, 324 (4th Cir. 2004) (*en banc*) (denying COA for claim's failure to raise "substantial constitutional question upon which reasonable jurists could disagree"); *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003), *cert. denied*, 540 U.S. 1208 (2004) (denying multiple COAs because prisoner did not show that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . [or] whether the district court was correct in its procedural ruling"); *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (denying COA because applicant did not show reasonable jurists "would find it debatable whether . . . [his motion] states a valid claim of the denial of a constitutional right"); *DeCato v. United States*, No. 00-2118, 51 Fed. Appx. 888, 889 (1st Cir. Nov. 27, 2002) (per curiam) (unreported) (denying COA for failure to show "reasonable jurists could debate whether . . . the issues presented were

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Thus, there are no "conflicting practices" among the circuits for this Court to resolve. *Cf.* Pet. at 15. The requirements for the granting of a COA expressed in 28 U.S.C. § 2253(c)(2), and elucidated by this Court in *Slack* and *Miller-El*, are clear and well-established. These requirements were followed by the Second Circuit in this case, and by the Second Circuit and every other circuit in scores of other cases.

II. The Second Circuit's Unpublished Order Applying The Prison Mailbox Rule To Cain's *Coram Nobis* Application Does Not Merit Supreme Court Review Because The Order Is Consistent With This Court's AEDPA Jurisprudence And Has No Effect On New York Law Or Procedure. The Fact That Only A Few Circuits Have Addressed This Prison Mailbox Issue, Under A Variety Of Factual Circumstances And Dependent Upon Idiosyncrasies In State Procedural Rules, Further Counsels Against Review Until A Clear Pattern Of Decisions Emerges.

A. Because Cain's *coram nobis* application was properly filed under New York law, and the Second Circuit's ruling applies only to the federal proceedings, the decision will have no effect on New York state law or procedure.

It is undisputed that Respondent Cain's state *coram nobis* application was "properly filed" under the terms of

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adequate to deserve encouragement to proceed further"); *Szuchon v. Lehman*, 273 F.3d 299, 312, 316 (3d Cir. 2001) (denying COA on due process claims for failure to make "a substantial showing of the denial of a constitutional right").

28 U.S.C. § 2244(d)(2) and in accordance with this Court's holding in *Artuz v. Bennett*, 531 U.S. 4 (2000), because "its delivery and acceptance [were] in compliance with the applicable laws and rules governing filings" in the state of New York, *id.* at 8, and therefore appropriately tolled AEDPA's statute of limitations. Not only did the New York appellate division treat Respondent Cain's application as having been properly filed, but the issue of timing never arose during his state proceedings because New York has no deadline for the filing of *coram nobis* applications. *See People v. Langfelt*, 249 N.Y.S.2d 949 (N.Y. App. Div. 1964) (requiring lower court to consider *coram nobis* application even though it was filed two years after petitioner had been released from prison).

Importantly, the Second Circuit's opinion in *Fernandez v. Artuz*, 402 F.3d 111 (2d Cir. 2005), did *not* hold that the mailbox rule can be used to overcome a state court's prior determination of untimeliness or improper filing. Rather, the opinion was carefully crafted to apply only to cases such as Cain's in which it is clear that a prisoner's postconviction application was properly filed under state law. *See id.* at 114 ("The timeliness of Fernandez's habeas petition depends upon when his state *coram nobis* petition was 'properly filed' pursuant to AEDPA's tolling provision"). Because untimely petitions are not "properly filed," *Fernandez* does not permit federal courts to treat untimely state petitions as timely. The Superintendent's assertion that the Second Circuit in *Fernandez* advocated "wholesale

adoption of the mailbox rule," *see* Pet. at 24-25, is therefore simply wrong.[9]

Because the filing date of Cain's *coram nobis* application is irrelevant to New York law and procedure, New York state courts will never be faced with the question of whether the prison mailbox rule, as announced by this Court in *Houston v. Lack,* 487 U.S. 266 (1988) (holding that *pro se* prisoners' notices of appeal are "filed" upon their delivery to prison officials for forwarding to the court), should apply to state *coram nobis* applications. As a result, there can be no conflict between New York law and the Second Circuit's decision to follow *Houston* and apply the prison mailbox rule to Cain's properly filed *coram nobis* application solely for the purpose of calculating federal tolling time under AEDPA.

Moreover, because the Second Circuit's ruling guides only a federal court's application of federal law, New York courts are free to decide on their own whether to apply the prison mailbox rule for state purposes. The Second Circuit's decision to apply the prison mailbox rule in the present case "solely for the purpose of calculating a *federal* statute of limitations" does not and cannot have any impact upon New York procedure or the state's ability to establish its own filing requirements, because a federal court can apply

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[9] The Superintendent also incorrectly suggests that the Second Circuit (presumably in *Fernandez*, as he provides no citation) "contradicted itself when it suggested that [New York] has no rule determining the time of filing." Pet. at 25. He appears to conflate rules that define how filing is to be construed with rules that prescribe a deadline after which filing, however construed, may not be accepted. The Second Circuit's statement about New York law's lack of a deadline for *coram nobis* applications, *see Fernandez*, 402 F.3d at 115, pertains to the latter type of rule.

the mailbox rule to a federal habeas petition only *after* state proceedings have been completed. *See Fernandez*, 402 F.3d at 115 n.3. Thus, the only real consequence of the Second Circuit's ruling in *Fernandez* is that prisoners who have properly filed a postconviction motion in New York will receive the benefit of the full year of AEDPA's statute of limitations, rather than be forced to file early to compensate for mailing delays or clerical error. *See id.*

B. All but one of the Circuits that have addressed this issue agree that state law should not control how federal courts calculate time tolled under AEDPA's statute of limitations.

In addition to the Second Circuit in *Fernandez* and *Cain*, only the Fifth, Ninth, and Tenth Circuits have addressed whether a federal court can apply the prison mailbox rule to a properly filed state application when calculating the amount of time tolled under AEDPA. *See Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001); *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), *cert. denied*, 531 U.S. 1195 (2001); *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999) (per curiam), *cert. denied*, 527 U.S. 1057 (2000).[10] The decisions

[10] The Superintendent's citation of *Vroman v. Brigano*, 346 F.3d 598 (6th Cir. 2003), is inapposite because, unlike the state petitions in *Anthony*, *Coleman*, *Fernandez*, and *LeMaster*, the state petition in *Vroman* was governed by a filing deadline. 346 F.3d at 602. The *Vroman* petitioner had missed this deadline and so his petition had never been properly filed and was therefore never under consideration by any state court. *Id.* at 603-604. *Vroman* therefore stands for the uncontroversial position, not inconsistent with the Second Circuit's ruling in *Fernandez*, that the prison mailbox rule cannot be used to overcome a state court's prior determination that a postconviction motion had been untimely filed. *See Vroman*, 346 F.3d at 604 ("this court will not reconsider the Ohio state courts' determination that Vroman's postconviction petition was untimely").

in *Anthony*, *Coleman*, *Fernandez*, and *LeMaster* defy easy comparison because each one is based on distinct factual circumstances and procedural ambiguities in varying state filing rules.[11] Nonetheless, the circuits are in far greater agreement than the Superintendent portrays them to be. *Cf.* Pet. at 19-20. In fact, far from the Second Circuit being "squarely in conflict with the other circuit courts," *id.*, the Second, Fifth, and Ninth Circuits all agree that state law should *not* control how a federal court calculates the amount of time tolled under AEDPA; only the Tenth Circuit has held otherwise.

Like the Second Circuit in *Fernandez*, the Ninth Circuit in *Anthony* held that once it is clear that a state application has been "properly filed," federal courts are to apply the federal mailbox rule for the purpose of calculating AEDPA tolling time. 236 F.3d at 575. The petitioner in *Anthony* had properly filed a state postconviction motion, but the Supreme Court of California had marked the petition as filed upon receipt, not mailing. *Id.* at 571, 575. The state petition's filing date, just as in Respondent Cain's case, made no difference to the outcome of the state case, but was determinative of whether the federal habeas petition was time-barred – and the federal court determined that the federal rule should apply. *Id.* at 574-75.

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[11] The Fifth, Ninth, and Tenth Circuits reiterated their holdings in, respectively, *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (citing *Coleman* as construing request that mailbox rule be applied to *pro se* habeas filing as "request for equitable relief"); *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir.), *amended by* 250 F.3d 1262, 1268 (9th Cir. 2000), *overruled on other grounds*, *Carey v. Saffold*, 536 U.S. 214 (2002); and *Moore v. Gibson*, 250 F.3d 1295, 1296, 1298 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001).

In *Coleman*, the Fifth Circuit was faced with a *pro se* petitioner who presented evidence that his Texas state postconviction motion had been mailed six weeks before the court stamped it as "filed." 184 F.3d. at 400. The result of the delay, apparently due to a state clerk's filing error, was that the petitioner's federal habeas petition would be time-barred if the federal court did not apply the mailbox rule to its consideration of the length of time tolled by the state motion. *See id.* at 402. But because Texas habeas petitions, like New York *coram nobis* applications, have no filing deadline, no Texas court was required to decide whether Texas would apply the mailbox rule to Coleman's petition, and at the time, no Texas case law revealed whether the mailbox rule would apply in such circumstances.[12] Moreover, Texas procedural rules were ambiguous on the subject. The petitioner pointed to Tex. R. Civ. P. 5, which provides that filing commences upon mailing, while the respondent argued that postconviction proceedings were controlled by Tex. R. Crim. P. art 11.07, which makes no mention of the timing of filing. *See Coleman*, 184 F.3d at 400, 402 n.1; Tex. R. Civ. P. 5 ("A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing"); Tex. R. Crim. P. art 11.07 (requiring only that an application for a writ of habeas corpus be filed "after final conviction in a felony case"). Faced with such conflicts and ambiguities, the Fifth Circuit ruled that it would not attempt to "interpret state

[12] The Texas Supreme Court subsequently announced a prison mailbox rule based on *Houston*'s principles of fairness in *Warner v. Glass*, 135 S.W.3d 681, 684 (Tex. 2004) ("we decline to penalize a pro se litigant for failing to obtain a postmark or a file-stamp when the litigant has timely placed the document in the prison mail system, the only delivery system to which he or she has access").

rules of filing [or] to address the filing systems of state courts." 184 F.3d. at 402. Like the Second and Ninth Circuits, the Fifth Circuit decided that a federal rule should control. But rather than apply the federal prison mailbox rule, which had become the presumptive rule for the vast majority of *pro se* filings in federal courts, *see* Part II.C, *infra*, the Fifth Circuit decided instead to examine for itself the facts of the prisoner's case to see if it merited application of the federal equitable tolling doctrine. *See* 184 F.3d. at 402.

The Tenth Circuit, on the other hand, held in *LeMaster* that principles of comity *required* federal courts to defer to state law on the question of whether to apply the federal mailbox rule when calculating federal tolling time under AEDPA. 223 F.3d at 1181. The court reached that conclusion even though New Mexico, too, had no filing deadline for the state habeas petition at issue, and as a result, no state law or cases addressed whether New Mexico courts would apply the mailbox rule to such petitions. *See id.* at 1181 n.3, 1182. The court therefore was forced to engage in a tortuous attempt to "predict" whether the New Mexico Supreme Court would apply the mailbox rule to state habeas petitions – even though New Mexico courts would never face that question given the absence of a filing deadline. *See id.* at 1182-83. The Tenth Circuit concluded that the New Mexico Supreme Court "at the very least" would require receipt by the clerk before a petition would be treated as having been filed, but left open the question of whether actual filing by the clerk was necessary.[13] *See id.*

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[13] In a later case dealing with Oklahoma filing law, the Tenth Circuit chose not to discern on its own what the state's law would be in regard to the mailbox rule, and instead, because Oklahoma had a

(Continued on following page)

The Superintendent, therefore, has greatly exaggerated the extent to which the mailbox issue presented in this case has "openly divided the circuit courts of appeals." *Cf.* Pet. at 17. Three out of the four circuits to have dealt with the question declined to permit ambiguous state filing rules to control how federal courts interpret the federal AEDPA filing deadline. Thus there is no urgent need for Supreme Court intervention at this time.

C. Applying the federal mailbox rule to state postconviction proceedings for the purpose of calculating federal tolling time under AEDPA follows *Houston*'s mandate to treat *pro se* petitioners fairly and furthers the principles of comity and federalism.

The Superintendent asks this Court to use the unreported order of the Second Circuit in this case to overturn a well-established – and almost entirely uniform – body of case law applying this Court's holding in *Houston* to other circumstances in which *pro se* prisoners have no control over the time of filing of their court papers. *See* Pet. at 20. But a summary order is the wrong vehicle with which to reexamine *Houston* and its progeny. Moreover, this case also presents no compelling legal or policy justification to circumscribe application of the prison mailbox rule.

To begin with, the same fairness considerations that led this Court to announce the rule in *Houston* also apply in this case. Most fundamentally, because he was "unskilled in law,

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procedure for responding to certified questions, certified to the Oklahoma Court of Criminal Appeals the question of whether the prison mailbox rule applied in Oklahoma postconviction proceedings. *See Moore*, 250 F.3d at 1296, 1298.

unaided by counsel and unable to leave the prison," *Houston*, 487 U.S. at 271, Cain had no way to monitor the filing of his *coram nobis* application or to know when the Second Department considered it to have been filed. *See id.* (noting how *pro se* petitioners are unable to "personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice"). As a result, contrary to the Superintendent's suggestion that routine delays in the filing of state post-conviction applications "can easily be anticipated," Pet. at 21, petitioners like Cain cannot anticipate with any certainty when their one-year filing deadline will have passed. Moreover, like the *pro se* prisoner in *Houston*, Cain faced a tight filing deadline – and the consequences of the mailbox rule not being applied were potentially devastating.[14] Had the Second Circuit not reversed the district court's refusal to apply to mailbox rule, Cain's constitutional claims would have never been heard, regardless of their potential merits. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (noting that a procedural dismissal "of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

Second, application of the mailbox rule to calculations of time tolled under AEDPA brings uniformity, clarity, and

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[14] The Superintendent's argument that the lack of a state filing deadline means that *Houston*'s fairness concerns do not apply, *see* Pet. at 25, conflates the state filing process with the dictates of the federal AEDPA deadline. Because AEDPA requires petitioners to first seek relief in state courts, AEDPA's one-year statute of limitations necessarily incorporates all of the state filings that toll the statute, making the timing of state filings, regardless of whether they have deadlines of their own, critical to the federal AEDPA deadline.

efficiency to the procedures by which state inmates assert their federal rights and by which federal courts enforce those rights. A uniform policy under which federal courts apply the mailbox rule to all properly filed postconviction motions when calculating AEDPA tolling time "standardize[s] the procedures that govern how inmates assert their federal rights, regardless of whether they are in federal or state prison, and regardless of their state of incarceration." *Fernandez v. Artuz*, 175 F. Supp. 2d 682, 686 (S.D.N.Y. 2001). Such a policy is the only way prisoners can monitor the timing of their filings with a degree of predictability, allowing them to know exactly how much time remains under AEDPA's statute of limitations as they attempt to exhaust their state remedies.

In addition, federal courts, which already uniformly apply the mailbox rule to the time of filing of federal habeas petitions, *see, e.g.*, *Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), also benefit from application of the rule to state filings under AEDPA. Without the mailbox rule, enforcement of AEDPA's filing deadline can require, as the Tenth Circuit learned in *LeMaster*, divining the intentions of state courts which may never be faced with the question of whether the mailbox rule should apply. Applying the mailbox rule, on the other hand, requires only an inquiry into the date on which the prisoner handed his pleadings to prison officials for mailing.

Moreover, this task is not as "factually complex" or susceptible to misrepresentation as the Superintendent asserts. *Cf.* Pet. at 21. As the cases cited by the Superintendent demonstrate, courts generally require substantive evidence of the date of mailing before giving prisoners the benefit of the mailbox rule. *See id.* at 21-22, *citing Edgar*

Velez v. Walker, No. 02-CV-1732 (E.D.N.Y. Feb. 5, 2003), *adopted* (E.D.N.Y. Mar. 27, 2003) (finding that record of prisoner's legal mail allotments showed correct date petitioner mailed his habeas petition despite his claim of earlier date); *Darryl Gadson v. M. McGinnis*, No. 99-CV-3624 (E.D.N.Y. Apr. 22, 2002) (declining to accept petitioner's representation that he had filed habeas petition earlier but it had been returned).

In fact, the Superintendent's entire discussion of the "considerable costs" of the prison mailbox rule, *see* Pet. at 21-24, is belied by the fact that federal courts have been applying the rule to nearly all filings of *pro se* prisoners, both state and federal, for years without any apparent difficulty. Federal courts today apply the rule to the filing of Section 1983 complaints, *see, e.g., Cooper v. Brookshire*, 70 F.3d 377, 381 (5th Cir. 1995); FTCA claims, *see, e.g., Garvey v. Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993); administrative complaints, *see, e.g., Longenette v. Krusing*, 322 F.3d 758, 765 (3d Cir. 2003); service of discovery responses, *see, e.g., Faile v. Upjohn Co.*, 988 F.2d 985, 988-89 (9th Cir. 1993); Rule 59(e) motions to amend judgment, *see, e.g., Edwards v. United States*, 266 F.3d 756, 758 (7th Cir. 2001) (per curiam); and federal habeas petitions, *see, e.g., Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000). *See generally, Sulik v. Taney County, Mo.*, 316 F.3d 813, 815 (8th Cir. 2003) (noting that all federal circuits to consider the issue have extended the prison mailbox rule to civil complaints). If applying the mailbox rule were as difficult as the Superintendent suggests, one would imagine scores of instances of prisoner misrepresentations deceiving courts into allowing filings or granting forms of relief they should not have. But the Superintendent does not cite a single such example.

Third, application of the mailbox rule for the purpose of calculating AEDPA tolling time furthers the interests of comity and federalism by allowing state proceedings to take their course without interference by federal courts. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights"); *Duncan v. Walker*, 533 U.S. 167, 179 (2001) ("The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period"). Applying the mailbox rule ensures that prisoners are not penalized for attempting to exhaust their claims in state court before filing in federal court. If the mailbox rule were not applied, *pro se* prisoners would be forced to file their federal habeas petitions while their state applications are still pending because although the mailbox rule gives prisoners control over the filing dates of their federal petitions, prisoners would lack such control over when state courts choose to consider their state applications as having been filed.

The Superintendent's claim that applying the mailbox rule is unfair to the state, *see* Pet. at 26 ("[w]hen a federal court undoes an otherwise final state conviction, respect for state processes is necessarily undermined"), is essentially an argument against federal habeas itself, regardless of whether or not the mailbox rule is applied. The truth is that because the mailbox rule "already applies to a broad variety of state prisoner filings in federal actions," it cannot "implicate new burdens on the state prison system." *Fernandez*, 402 F.3d at 115 n.3. In New York, for example, state prisons have had several years of experience dealing with the application of the mailbox rule to the filing of federal habeas petitions, *see Noble*, 246 F.3d at 97-98;

Section 1983 complaints, *see Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir. 1993), *modified on reh'g*, 25 F.3d 81 (2d Cir. 1994); and administrative claims, *see Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999).

The Superintendent's final substantive argument is that Congress could not have intended "for the same word, 'filing,' to have two such different meanings simultaneously: a federal one in the first context and a state one in the second." Pet. at 26. But it is not unusual for a federal court to apply state law when determining whether an application has been properly filed, while using federal law to calculate the length of the pendency of the application. For example, in Section 1983 cases filed by *pro se* prisoners, federal courts regularly look to state law to determine the length of the applicable statute of limitations, but then use the federal prison mailbox rule to determine the actual date of filing. *See, e.g., Casanova v. Dubois*, 304 F.3d 75, 78 n.4, 79 (1st Cir. 2002) (borrowing Massachusetts' three-year statute of limitations for personal injury actions in determining length of limitations period for prisoners' Section 1983 claims, but applying federal prison mailbox rule to determine date of filing); *Lewis v. Richmond City Police Dept.*, 947 F.2d 733, 736 (4th Cir. 1991) (borrowing Virginia's two-year statute of limitations for personal injury actions, but applying federal prison mailbox rule to determine date of filing); *see also Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (applying, in a diversity case, Kentucky's one-year statute of limitations for medical malpractice claims but applying the federal prison mailbox rule to determine date of filing).

This Court's decision in *Houston* also demonstrated that the meaning of the term "filed" depends upon context. The *Houston* Court was careful to note that the mailbox

rule can only be applied in cases in which the prisoner's filings actually reach the court, no matter when they were given to prison officials. *See Houston*, 487 U.S. at 273 (distinguishing between "timing" and "destination"). Thus, in order to apply the mailbox rule, courts must always make a two-step inquiry: first, into whether the papers were ever properly filed; and second, into when the papers should be considered as having been filed. In Cain's case, following this Court's jurisprudence, the first question – proper filing – is determined by reference to New York state law, while the second question requires application of *Houston*'s federal mailbox rule.

Therefore, the Second Circuit's application of the federal prison mailbox rule to Respondent Cain's case solely to calculate time tolled under the federal AEDPA furthers the principles of comity, federalism, and fairness and thus provides no justification for Supreme Court review.

CONCLUSION

For the reasons given above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 04-1726

IN THE

Supreme Court of the United States

VINCENT T. HERBERT,

Petitioner,

v.

ALMEIN CAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Respondent Has Failed to Demonstrate that the Second Circuit Satisfied the Prerequisite to Its Exercise of Jurisdiction in this Case, and His Attempts to Deny the Conflict Among the Lower Courts on This Issue Are Unpersuasive.

In his Brief in Opposition to the Petition for Certiorari, respondent Cain does not dispute that he was required, under this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), to make a substantial showing of the denial of a constitutional right in order for the Second Circuit to exercise jurisdiction over the appeal. Similarly, respondent does not dispute that neither the district court nor the Second Circuit ever made such a finding in any of its orders or opinions, and indeed never addressed the issue in any manner whatsoever. Nevertheless, respondent asserts that the Second Circuit lawfully exercised jurisdiction, arguing that because such a requirement exists, the Second Circuit must have found that a substantial showing had been made. Respondent aiso attempts to establish, in his Brief in Opposition, the existence of constitutional issues satisfying the substantial showing requirement. Finally, respondent flatly asserts that no conflict exists among the lower courts on this issue. None of these arguments are persuasive.

Respondent's first contention fails because it simply assumes that the Second Circuit must have exercised jurisdiction properly. Under respondent's argument, the mere existence of the requirement establishes that it must have been found to have been satisfied. But, in the absence of any suggestion in the record of this case that the issue was ever addressed or the requirement cownsidered below, the

assumption is based on nothing more than conjecture.

Moreover, respondent's assumption cannot be justified by looking at this matter as an aberrational case – one in which the court merely forgot to mention its conclusion on this issue – as respondent suggests. The failure to require or address the necessary showing is common both inside and outside the Second Circuit. Notwithstanding respondent's preference for published decisions, numerous opinions establish that it is routine to grant certificates of appealability without considering whether the requisite showing has been made. Cert. Pet. at 13-14. Because the issue is both jurisdictional and affects many cases, it deserves this Court's attention.

Nor is respondent's attempt to make the requisite showing at this juncture appropriate. The fact that the lower courts in this case failed to consider the issue is sufficient to establish the wrongfulness of the Second Circuit's assumption of jurisdiction. At the very least, this unlawful exercise of jurisdiction justifies a directive from this Court, even if only in a summary order, to consider the necessary prerequisite.

Moreover, the purported "substantial showing" respondent now offers is anything but that. Respondent maintains that he has an obviously-worthy constitutional claim in that his arrest was the product of the allegedly coerced confession of his co-defendant. Bf. Opp. at 8-9. But the state court, after hearing evidence from six police witnesses, an assistant district attorney, and the co-defendant, specifically rejected the factual contentions that the co-defendant had been beaten by the police and that his confession had been coerced. *See People v. Amaury Rosario, Sean Estrella, and Almein Cain*, Ind. No. 5644/95, at 2-7 (Sup.Ct. Queens Co. March 31, 1997)

(RA 2-7).[1] This factual finding is presumed correct on federal habeas review, 28 U.S.C. § 2254(e)(1), and respondent has offered nothing to undermine this conclusion since the time of the state court hearing. Because this factual finding easily disposes of this claim, respondent's contention does not satisfy the statutory standard, much less establish that the Second Circuit "must have" adopted it.

In addition, respondent now claims to have made a substantial showing of the denial of a constitutional right based on a purportedly suggestive lineup. Bf. Opp. at 9. But he made no such claim in his application for a certificate of appealability, and there is no reason to believe that the panel considered the claim *sua sponte*. Moreover, respondent did not raise the issue in his brief on appeal in response to the jurisdictional objection by the state, even though respondent was then represented by the same firm that represents him now. Thus, this claim cannot justify the conclusion that the Second Circuit "must have" adopted it, without it being raised or mentioned, and "must have" based its exercise of jurisdiction upon it.

Respondent also appears to complain that the state is demanding a finding on the "merits," not authorized or appropriate because "a COA determination is *not* a 'merits determination.'" Br. Opp. at 10 (emphasis in original). But the state has never maintained that the Second Circuit should have made an ultimate merits determination on any of Cain's issues, only that some preliminary showing of the denial of a constitutional right was required under *Slack* before jurisdiction could be exercised. Respondent's objection then is entirely

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[1]Numbers in parentheses preceded by RA refer to the Respondent's Appendix in the Second Circuit.

inapposite.

Respondent also attempts to deny that any conflict exists among the circuits on this issue, pointing to many cases in which courts have required a showing of a denial of a constitutional right. Br. Opp. at 10-11, 15-16. But most of the cited cases do not implicate any procedural issue whatsoever or discuss *Slack's* two-pronged test.[2] They shed no light, therefore, on the current question. The remainder of the cases establish no more than that courts apply the *Slack* rule where the district court has held, as in *Slack* itself, that particular claims were barred based on an independent and adequate state ground or a lack of exhaustion.[3] These cases are also of limited relevance. There is no doubt that the lower courts follow *Slack* in the precise context of that case, as indeed they must. The issue that has engendered such confusion is the application of *Slack* to statute of limitations dismissals. Indeed, many lower courts have failed to observe the *Slack* requirement in these circumstances, as explained at length in the Petition for Certiorari. Cert. Pet. at 13-14. Thus, citations to the distinct, and non-controversial, issues identified by respondent do not address, and cannot eliminate, the conflict over the separate question of *Slack*'s application to timeliness dismissals. Moreover, it is precisely because the cases cited by petitioner do

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[2]These cases include *Centobie v. Campbell*, 407 F.3d 1149 (11th Cir. 2005); *Hughes v. Dretke*, 405 F.3d 582 (5th Cir. 2005); *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005); *Morales v. Greiner*, 381 F.3d 47 (2d Cir. 2004); *United States v. Outen*, 286 F.3d 622 (2d Cir. 2002); *Cyars v. Hoffbauer*, 383 F.3d 485 (6th Cir. 2004).

[3]These cases include *Houser v. Dretke*, 395 F.3d 560 (5th Cir. 2004); *Jones v. Keane*, 329 F.3d 290 (2dCir. 2003), *cert. denied*, 540 U.S. 1046 (2003); *Eltayib v. United States*, 294 F.3d 397 (2d Cir. 2002); and *Franklin v. Hightower*, 215 F.3d 1196 (11th Cir. 2000).

not treat the disputed issue here that they were "conveniently left out" of the petition for certiorari. Br. Opp. at 15.

Nor are respondent's attacks on the state's citation of relevant caselaw – treating the application of *Slack* to statute of limitations dismissals – adequate to dispel the conflict. For example, as to *Franklin v. Dretke*, 106 Fed. Appx. 926 (5th Cir. 2004), respondent concedes that the circuit court granted a COA on the timeliness issue without ever addressing whether the petitioner had made a substantial showing of the denial of a constitutional right, and that the court reversed the lower court's ruling, thus clearly exercising jurisdiction over the matter. He points out, however, that the circuit court remanded the case for consideration of the constitutional claims set forth in the petition. But this hardly establishes that the circuit court considered the necessary substantial showing requirement before it granted a certificate of appealability and reversed; indeed, the circuit court does nothing more than direct the lower court to consider the merits once the court overturned the statute of limitations dismissal.

As to several other cases,[4] respondent asserts that the state did not object to jurisdiction in their briefs on appeal. Br. Opp. at 13-14. But the state's failure to object did not obviate the statutory jurisdictional requirement, which those courts were bound to address in any event. And the state's failure to object in those cases certainly did not bind the state here, which did assert the jurisdictional defect, and, as a result, the Second Circuit could not properly ignore the issue, as it in fact did.

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[4] *Day v. Crosby*, 391 F.3d 1192 (11th Cir. 2004); *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003); and *Harrison v. Artuz*, 105 F.Supp. 2d 101 (E.D.N.Y. 2000), *aff'd sub nom. Clark v. Barkley*, 51 Fed. Appx. 332 (2d Cir. 2002).

And as to still other cases,[5] respondent offers little argument, other than to say that these are unpublished decisions. But, whether published or unpublished, these decisions attest to the fact that it is common within the Second Circuit, and some other circuits, to grant COAs with regard to timeliness dismissals without consideration of the statutory prerequisite. Whether formally adopted or not, the practice exists and is widespread, and for this reason, and because it is the basis for jurisdiction on appeal, should be addressed by this Court.

Finally, respondent's citation to *Catlett v. Greiner*, 76 Fed. Appx. 345 (2d Cir. 2003), is inapposite. In that case, the Second Circuit held that it would not review the denial of the State's motion to dismiss in the district court upon an appeal by the habeas petitioner, and held that, in any event, the petition was properly denied by the district court on the merits. In arriving at this result, the Second Circuit did not, in fact, even cite *Slack*, but clearly disposes of the timeliness in this manner because, in this posture, "the [timeliness] issue presents us with no case or controversy on which petitioner could be granted habeas relief." *Id.* at 347. The case does not therefore establish that the Second Circuit adheres to *Slack* in this context.

In sum, because respondent is unable to erase the conflicting practices of different courts or to resolve what must at the very least be considered immense confusion over the requirements for exercising jurisdiction on appeals from timeliness dismissals, this Court should grant the certiorari.

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[5] *Bond v. Walsh*, 2002 U.S. Dist. Lexis 4826 (E.D.N.Y. February 12, 2002), *dismissal vacated*, 53 Fed. Appx. 162 (2d Cir. 2002); *Harrison v. Artuz*, 105 F.Supp. 2d 101 (EDNY 2000), *aff'd sub nom. Clark v. Barkley*, 51 Fed. App. 332 (2d Cir. 2002); *Brigian v. Artuz*, 37 Fed. Appx. 559 (2002).

II. Despite Respondent's Characterization of the Law, the Circuit Courts are Divided Over the Application of the Federal Mailbox Rule of *Houston v. Lack*, 487 U.S. 266 (1988) to State Court Filings, and this Conflict Merits the Attention of this Court.

In his Brief in Opposition, respondent attempts to deny the existence of any conflict between the circuits on the application of *Houston v. Lack* , 487 U.S. 266 (1988), to state post-conviction petitions under the tolling provision of the habeas corpus statute of limitations. He also argues that this extension of *Houston* would pose little or no problem to the states, which must deal with the rule as applied in federal court in any event. Finally, he points out that New York does not impose a deadline on coram nobis petitions, such as the one he filed in state court in this case, concluding from this both that his petition was "properly filed" and that the state has no interest contrary to the application of the mailbox rule here. These arguments are unavailing.

First, respondent's attempts to deny the conflict are belied by the decisions of the Second Circuit itself, which has expressly acknowledged it. For example, in *Catlett v. Greiner*, 76 Fed. Appx. 345 (2d Cir. 2003), cited by respondent, the Second Circuit recognized that "[t]he applicability of the prison mailbox rule to state filings that toll a federal statute of limitations is an issue that has divided federal circuit courts." *Id.* at 346. The court noted, as did the state here in the Petition for Certiorari, that "[t]he Fifth, Tenth, and Eleventh Circuits have declined to apply the rule to state court filings," and that the Ninth Circuit had ostensibly come to a different conclusion, *Id.* at 346-47. Similarly, in *Fernandez*, the Second Circuit acknowledged that while the Ninth Circuit appeared to apply the mailbox rule, "[o]ther circuits . . . defer to the state court's application of state filing laws." *See also* 28-671 Moore's

Federal Practice, Criminal Procedure §671.02 ("the courts are split as to whether the tolling period begins on the date that a pro se petitioner mailed a state post-conviction petition to the state court or on the date when it was received and filed"). Thus, there can be no question that the conflict is real and not "manufactured," as respondent suggests.

Second, respondent's contention that the rule imposes no burdens on the state, as the state must deal with the rule as applied to federal court filings in any event, is simply wrong. To the contrary, the state must shoulder a vastly increased burden of the costs associated with the mailbox rule if it is used to toll for every state post-conviction application. Cert. Pet. at 21-23. The difficulties in discovering and litigating the actual date on which the relevant papers are handed to prison authorities, a process which has engendered substantial litigation in the habeas context, are dramatically increased when they are multiplied by the number of state court petitions in a given case, which often rises into the dozens. Records dating back years must be unearthed, and in a prison system the size of New York's, the task is monumental, resulting in the inability to dispute these old claims. That inability, in turn, opens the door to petitioners who are far too ready to take advantage of the opening and make baseless assertions about when their filings have been sent. Indeed, respondent here did precisely this, claiming that his petition was sent some five months before it could possibly have been given to prison authorities (a fact "conveniently left out"of the Brief in Opposition). And while particularly some petitioners such as respondent Cain may occasionally be caught, in the vast majority of cases the district courts are forced to simply take the prisoners' assertions at face value. These added periods of delay, routinely brought about by manipulation, dramatically undermine the habeas corpus statute of limitations and cripple it as an independent restraint supporting the finality of convictions.